In these circumstances, Respondent's suggestion that the Court should abdicate resolution of the question presented to the courts of appeals is particularly unsound. If certiorari is denied, plaintiffs opposing removal would continue to have the opportunity to relitigate the question presented within the circuits that allow removal. Defendants seeking removal, in contrast, likely will continue to be precluded by operation of 28 U.S.C. § 1447(d) from appealing the remands now required by circuit precedent based on a premise that *Beneficial* has now held is incorrect. There is thus little prospect for these courts of appeals to reconsider their positions. The Petition demonstrated these unique jurisdictional obstacles to further percolation of the question presented, *see* Pet. 19-20, but Respondent has failed to address the consequent need for this Court's prompt review.

---

statute wholly displaces the state-law cause of action through complete pre-emption." 539 U.S. at 6-8.

CONCLUSION

The petition for a writ of certiorari should be granted.

ROBERT S. HAWKINS
ANDREW J. ROLFES
KLETT, ROONEY, LIEBER & SCHORLING
Two Logan Square
12th Floor
Philadelphia, PA 19103
(215) 567-7500
Of Counsel

PAUL A. CUNNINGHAM
Counsel of Record
GERALD P. NORTON
DAVID A. BONO
SIMON A. STEEL
HARKINS CUNNINGHAM LLP
1700 K Street, N.W.
Suite 400
Washington, DC 20006-3817
(202) 973-7600
Attorneys for Petitioners

August 31, 2005

(4)

FILED
SEP 21 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-106

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD INC., *et al.*,
Petitioners,

v.

JAMES T. RODDY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

ROBERT S. HAWKINS
ANDREW J. ROLFES
KLETT, ROONEY, LIEBER & SCHORLING
Two Logan Square
12th Floor
Philadelphia, PA 19103
(215) 567-7500
Of Counsel

PAUL A. CUNNINGHAM
Counsel of Record
GERALD P. NORTON
DAVID A. BONO
SIMON A. STEEL
HARKINS CUNNINGHAM LLP
1700 K Street, N.W.
Suite 400
Washington, DC 20006
(202) 973-7600
Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

No. 05-106

GRAND TRUNK WESTERN RAILROAD INC., *et al.*,
Petitioners,

v.

JAMES T. RODDY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

Pursuant to Rule 15.8 of the Rules of this Court, Petitioners submit this supplemental brief to inform the Court that a panel of the United States Court of Appeals for the Second Circuit has issued an opinion that addresses the question presented in the Petition. *Sullivan v. Am. Airlines, Inc.*, 2005 WL 2210337 (Sept. 13, 2005), App. 18a (holding that "there is no complete preemption under the RLA," and thereby "align[ing] ourselves on one side of a circuit split").[1]

[1] The *Sullivan* decision will not become final until after the Court's September 26 conference. *See* Fed. R. App. P. 41(b) (mandate does not issue until time for petition for rehearing expires). Petitioners are promptly notifying the Court, however, to discharge their obligation to call such developments "to the attention of the Court *without delay*." *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985) (emphasis in original).

Sullivan acknowledges that the Second Circuit had previously held that, "where a complaint raises state-law claims that are 'in fact preempted by the RLA, the action may properly be removed to the federal courts, even when the plaintiff's complaint does not itself include a federal cause of action.'" App. 12a (quoting *Shafii v. British Airways, PLC,* 83 F.3d 566, 569 (2d Cir. 1996)); *see also* Pet. 17-18 (discussing *Shafii*). The *Sullivan* panel rejected that holding and instead held that, "even if state-law claims qualify as minor disputes under the RLA, the RLA does not completely preempt those claims and therefore does not provide federal courts with original jurisdiction over them." App. 2a.[2]

Consistent with Petitioners' demonstrations, Pet. 13-19; Reply 2-3, the *Sullivan* opinion expressly recognizes the existence of a deep split among the courts of appeals on the question presented. App. 18a & n.9. If the *Sullivan* decision becomes final as is, it would change the six-to-three circuit split described by the Petition, Pet. 13-20, into a five-to-four split.

The *Sullivan* panel based its decision not to follow prior Second Circuit precedent on its view that this Court's decision in *Beneficial National Bank v. Anderson,* 539 U.S. 1 (2003), "'casts doubt'" on authorities on the majority side of the split. App. 12a (citation omitted). However, as Petitioners have argued (Reply at 6-7), *Beneficial* should instead be read as casting doubt on the determinations of the minority circuits, in light of its holding that "the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable." *Beneficial*, 539 U.S. at 9 n.5. The *Sullivan* panel's questionable reading of *Beneficial* thus adds to the controversy exhibited in the earlier

---

[2] The panel had raised the issue of complete preemption under the RLA *sua sponte*, after the parties had briefed the case on the jointly-held understanding that the RLA does give rise to federal question jurisdiction over minor disputes. *See* App. 6a n.3, 11a.

briefing regarding the implications, if any, of *Beneficial* for the question presented under the RLA. *Compare* Pet. 25-26 & nn. 15, 16, *and* Reply 6-7, *with* Opp. 22-24, 27.

The *Sullivan* panel also recognized that "a federal statute with completely preemptive force also gives rise to original federal jurisdiction, and as a consequence allows removal under 28 U.S.C. § 1441." App. 15a. However, it neglected this Court's RLA precedents upholding federal question jurisdiction (discussed in the Petition at pages 21 to 23) when it determined that Section 3 of the RLA does not give rise to original federal jurisdiction.

If *Sullivan* becomes final as is, it would further compromise what Congress intended to be a uniform federal law of labor relations governing the Nation's interstate air and rail transportation infrastructure. A great deal of interstate commerce is transported through the states of the Second Circuit. *Sullivan* would add significantly to the scope of commerce affected if more state courts were allowed to render potentially inconsistent interpretations of the RLA and of the collective bargaining agreements that it governs. *Cf.* Amicus Br. of Airline Industrial Relations Conference *et al.*, at 7-8.

For the foregoing reasons and for the reasons set forth in the Petition and in Petitioners' Reply Brief, the Petition should be granted.

Respectfully submitted,

ROBERT S. HAWKINS
ANDREW J. ROLFES
KLETT, ROONEY, LIEBER
& SCHORLING
Two Logan Square
12th Floor
Philadelphia, PA 19103
(215) 567-7500

Of Counsel

PAUL A. CUNNINGHAM
Counsel of Record
GERALD P. NORTON
DAVID A. BONO
SIMON A. STEEL
HARKINS CUNNINGHAM LLP
1700 K Street, N.W.
Suite 400
Washington, DC 20006
(202) 973-7600

Attorneys for Petitioners

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 04-0325-CV

JOHN SULLIVAN, JOHN KENNEDY, DAVID VIRELLA,
and VINCENT ARGENTINA,
Plaintiffs-Appellants,

v.

AMERICAN AIRLINES, INC., STAN ROBERTS,
EDWIN P. ARGONZA, II, MICHAEL A. CHIOFALO,
ALBERT GIL, and PETER A. PEREZ,
Defendants-Appellees.

Argued Sept. 28, 2004
Decided Sept. 13, 2005

Before: WALKER, *Chief Judge*, LEVAL and KATZMANN, *Circuit Judges*.

JOHN M. WALKER, *Chief Judge*.

The plaintiffs in this case, union members and employees of American Airlines, were mostly on the losing side of a hard-fought union election. They blame the loss, at least in part, on American, which suspended them during the campaign and then fired them for allegedly posting racist campaign fliers. Although American later reinstated them, the plaintiffs also want their names cleared of the taint of racism flowing from American's conclusion that they posted racist fliers. The plaintiffs also object to campaign fliers posted by their opponents in the election. To clear their names and

recover for their loss of reputation, the plaintiffs filed a state-law defamation suit in New York state court against American, two of its managers, and three union members who ran against them.

American removed the case to federal court, arguing that (1) because the plaintiffs' state-law defamation claims were so-called minor disputes under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, the district court had jurisdiction over the claims, and (2) because the RLA preempts state-law claims that are minor disputes, the claims should be dismissed. The district court (Carol Bagley Amon, *Judge*) agreed in part, dismissing one count of the complaint as preempted and remanding the other two counts to state court.

Unlike the district court, we do not reach the question whether the plaintiffs' state-law claims are the type of so-called minor disputes that, under the RLA, are within the exclusive primary jurisdiction of arbitral panels established pursuant to the RLA. Instead, we hold that even if state-law claims qualify as minor disputes under the RLA, the RLA does not completely preempt those claims and therefore does not provide federal courts with original jurisdiction over them. The district court therefore lacked subject-matter jurisdiction over this case. Accordingly, we vacate the district court's judgment and remand with instructions that the case be remanded to state court.

I. BACKGROUND

In the spring of 2002, plaintiffs John Sullivan, David Virella, and Vincent Argentina, American Airlines employees, ran for reelection to their positions as officers of Air Transport Local 501 of the Transport Workers Union of America. Defendants and fellow employees Michael Chiofalo, Albert Gil, and Peter Perez ran on an opposing slate.

According to the plaintiffs, during the campaign, the defendants posted in the workplace fliers disparaging Sullivan, Virella, and Argentina.[1]

Meanwhile, someone posted a flier accusing defendant Gil of having lied about his ethnicity. American Airlines has strict rules about racial harassment in the workplace, and defendants Stan Roberts and Edwin Argonza, managers at American, investigated the posting of this flier. In the course of the investigation, American suspended with pay plaintiffs Sullivan, Virella, Argentina, and John Kennedy (a fellow employee but not a candidate). Voting in the union elections took place while the plaintiffs were suspended; Sullivan and Virella lost their elections.

As a result of its investigation, American concluded (wrongly, according to the plaintiffs) that the plaintiffs had posted the flier about Gil. American fired all four plaintiffs and issued notices of termination, termed "final advisories," that included statements accusing them of having posted the flier. But after the plaintiffs lodged a grievance with the union protesting their termination, American backed down. American reinstated them, but it recast the "final advisories" (termination notices) as "second advisories" (warnings) that reiterated American's finding that the plaintiffs had posted the flier about Gil.

Not satisfied with just returning to work, the plaintiffs filed suit in New York state court alleging three counts of defamation. Count 1 accused opposing candidates Chiofalo, Gil,

---

[1] The fliers included the following statements and others like them: "Jack Sullivan, Secretary Treasurer of Local 501, guilty of discrimination by the U.S. government against its members"; "Guilty as charged! . . . The Dave Virella administration has been found guilty of discriminating against its own members by the Equal Employment Opportunity Commission. . . . Guilty of unlawful employment practices against its own members." The "Dave Virella administration" allegedly referred to the plaintiffs collectively.

and Perez of defaming plaintiffs Sullivan, Virella, and Argentina under state law by posting "libelous" fliers about the plaintiffs; Count 1 also alleged that American was liable for the defamation because it allowed the fliers to remain on a company bulletin board. Count 2 accused American and its managers Roberts and Argonza of defaming all four plaintiffs by, inter alia, issuing the "final advisories" that asserted that the plaintiffs had posted the flier about Gil. Count 3 accused Chiofalo alone of defaming all four plaintiffs by asserting, at a union meeting, that the plaintiffs had posted the flier about Gil.

American responded by removing the case to federal court on the basis that Counts 1 and 2 asserted claims governed by the Railway Labor Act (RLA), 45 U.S.C. §§ 151-52, 154-88 (the airline-relevant provisions). The RLA gives primary jurisdiction over disputes between airlines and their employees that "grow[ ] out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" to "board[s] of adjustment" (arbitral panels) established under the RLA. *See* 45 U.S.C. § 184; *see also id.* § 153 (First) (i) (governing railroads);[2] *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987). Such disputes are known as "minor disputes" under the RLA, as distinguished from "major disputes," which involve the formation of collective-bargaining agreements (CBAs) and are governed by different provisions of the RLA. *See Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 302-03, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989) (explaining the difference between minor and major disputes). The major-dispute provisions of the RLA are not relevant to this case.

---

[2] Section 153 (First) (q) also provides for limited federal-court review of the adjustment boards' decisions.

On its face, the plaintiffs' complaint raises only state-law defamation claims. The Supreme Court has explained, however, that "where the resolution of a state-law claim depends on an interpretation of [a collective-bargaining agreement], the claim is preempted" by the RLA and must be brought before one of the arbitral panels established pursuant to the RLA. *Hawaiian Airlines v. Norris*, 512 U.S. 246, 261, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). American argued before the district court that because resolution of the state-law defamation claims against it (Counts 1 and 2 of the complaint) would require the district court to interpret the collective-bargaining agreement, the claims were preempted and could not be heard in state or federal court.

As to Count 1, the district court disagreed. It found that the state-law defamation claim based on American's alleged endorsement of defamatory fliers posted by Chiofalo, Gil, and Perez could be evaluated without reference to the CBA and thus was not preempted by the RLA. As to Count 2, however, the district court agreed with American that resolving it would require interpreting the CBA and that it was preempted. It is from the dismissal of Count 2 alone that the plaintiffs appeal to this court.

II. DISCUSSION

Because the district court dismissed Count 2 on the pleadings, we review the district court's decision de novo, taking the allegations in the complaint as true and making all reasonable inferences in the plaintiffs' favor. *Ziemba v. Wezner*, 366 F.3d 161, 163 (2d Cir.2004) (per curiam). The plaintiffs raised only state-law claims in their complaint, and the district court understandably, though mistakenly, accepted the premise of American's notice of removal that if the state-law claims in Counts 1 and 2 were preempted by the RLA, the district court had subject-matter jurisdiction over the case

to decide the preemption question.[3] That premise, though it found some support in our case law when the district court made its ruling, was mistaken. To understand why, we must examine the law of federal preemption in general and RLA preemption in particular as well as the difference between "complete" preemption, which can be the basis for federal subject-matter jurisdiction, and "ordinary" preemption, which cannot.

A. Preemption and federal subject-matter jurisdiction

Federal courts are courts of limited jurisdiction. U.S. Const. art. III, § 2, cl. 1. American removed this case to federal court under 28 U.S.C. § 1441, which permits removal only of actions over which "the district courts of the United States have original jurisdiction . . . ." *Id.* § 1441(a); *see also id.* § 1441(b). If it exists at all, original jurisdiction in this case can be based solely on federal-question jurisdiction under 28 U.S.C. § 1331, which gives federal district courts jurisdiction over suits "arising under the Constitution, laws, or treaties of the United States." The district court assumed (as did the parties) that if Count 2 was preempted by the RLA, a federal statute, Count 2 therefore arose under federal law.

The plaintiffs, however, raised only state-law claims in their state-court complaint. As a general rule, a suit seeking recovery under state law is not transformed into a suit "arising under" federal law merely because, to resolve it, the court may need to interpret federal law. *See Gully v. First Nat'l Bank*, 299 U.S. 109, 115, 57 S.Ct. 96, 81 L.Ed. 70 (1936) ("Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit."). This

[3] We raised sua sponte the question whether RLA preemption, even if found, could be a proper basis for federal subject-matter jurisdiction. The parties did not contest this issue below or on appeal, and the district court did not address it.

principle underlies the well-pleaded-complaint rule, which dictates that federal subject-matter jurisdiction can be founded only on those allegations in a complaint that are "well pleaded." *See Rivet v. Regions Bank of La.*, 522 U.S. 470, 475, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). The well-pleaded-complaint rule mandates that in assessing subject-matter jurisdiction, a federal court must disregard allegations that a well-pleaded complaint would not include—e.g., allegations about anticipated defenses. *Rivet*, 522 U.S. at 475 ("A defense is not part of a plaintiff's properly pleaded statement of his or her claim."). Thus, a plaintiff may not create federal subject-matter jurisdiction by alleging in his complaint that the defendant's (anticipated) federal defense should fail. *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 14, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

While the well-pleaded-complaint rule directs federal courts to disregard certain elements of a complaint in assessing federal subject-matter jurisdiction, federal courts sometimes do the inverse: read into a complaint elements that the plaintiff omitted. The artful-pleading doctrine, a corollary to the well-pleaded-complaint rule, rests on the principle that a plaintiff may not defeat federal subject-matter jurisdiction by "artfully pleading" his complaint as if it arises under state law where the plaintiff's suit is, in essence, based on federal law. *See Rivet,* 522 U.S. at 475-76; *see also Franchise Tax Bd.*, 463 U.S. at 22 ("[I]t is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint."); *cf. Marcus v. AT & T Corp.*, 138 F.3d 46, 53-54 (2d Cir.1998). Faced with such an artfully (i.e., misleadingly) pleaded complaint, the federal court may construe the complaint as if it raised the federal claim that actually underlies the plaintiff's suit. *Rivet*, 522 U .S. at 475.